

E-Filed 6/22/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EBONE LEROY EAST,

Plaintiff,

v.

WALKENHORSTS,

Defendant.

No. C 11-00826 RS (PR)

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*

1 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

2 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
3 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
4 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
5 plausibility when the plaintiff pleads factual content that allows the court to draw the
6 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
7 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions
8 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
9 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
11 (1) that a right secured by the Constitution or laws of the United States was violated, and
12 (2) that the alleged violation was committed by a person acting under the color of state law.
13 *See West v. Atkins*, 487 U.S. 42, 48 (1988).

14 **B. Legal Claims**

15 Plaintiff alleges that defendant Walkenhorsts, a private company under contract with
16 the California Department of Corrections to provide canteen items to California prisons,
17 infringed on his copyright by listing a work by plaintiff in its catalogue without his
18 permission. Under the facts alleged in the complaint, this defendant cannot be sued under
19 42 U.S.C. § 1983. Specifically, plaintiff does not allege that defendant acted under color of
20 state law, a requirement under § 1983. Action taken by a private organization may be under
21 color of state law “if, though only if, there is such a close nexus between the State and
22 the challenged action that seemingly private behavior may be fairly treated as that of the
23 State itself.” *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288,
24 295 (2001) (internal quotations omitted). The Supreme Court has found state action when a
25 challenged activity results from the state’s exercise of coercive power, when the State
26 provides significant encouragement for the activity, or when a private actor operates as
27 a willful participant in joint activity with the State. *See id.* In the instant matter, plaintiff
28


1 alleges no specific facts suggesting that defendant's conduct could fairly be treated as
2 conduct of the state itself. Furthermore, because plaintiff alleges purely private conduct by
3 defendant, such allegations do not meet the standards for cognizable claims under § 1983.
4 *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (a private citizen does not act under color of
5 state law, an essential element of a § 1983 action).

6 Accordingly, the complaint is DISMISSED with leave to amend. Plaintiff shall file an
7 amended complaint addressing the deficiencies detailed above within 30 days from the date
8 this order is filed. Plaintiff must allege specific facts, and not put forth conclusory
9 allegations. The first amended complaint must include the caption and civil case number
10 used in this order (11-00826 RS (PR)) and the words FIRST AMENDED COMPLAINT on
11 the first page. Because an amended complaint completely replaces the previous complaints,
12 plaintiff must include in his first amended complaint all the claims he wishes to present and
13 all of the defendants he wishes to sue. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
14 1992). Plaintiff may not incorporate material from the prior complaint by reference. Failure
15 to file an amended complaint in accordance with this order will result in dismissal of this
16 action without further notice to plaintiff.

17 It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
18 informed of any change of address by filing a separate paper with the clerk headed "Notice
19 of Change of Address." He must comply with the Court's orders in a timely fashion or ask
20 for an extension of time to do so. Failure to comply may result in the dismissal of this action
21 pursuant to Federal Rule of Civil Procedure 41(b).

22 **IT IS SO ORDERED.**

23 DATED: June 22, 2011


RICHARD SEEBORG
United States District Judge